

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES )

v. )

MANNING, Bradley E., PFC )

U.S. Army, (b) (6) )

Headquarters and Headquarters Company, U.S. )

Army Garrison, Joint Base Myer-Henderson Hall, )

Fort Myer, VA 22211 )

**DEFENSE RESPONSE TO  
GOVERNMENT REQUEST FOR  
JUDICIAL NOTICE**

DATED: 17 August 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this Court to deny the Government's request for judicial notice of the joint resolution dated 18 September 2001 authorizing use of force, also known as Public Law 107-40.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Government has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were referred on 3 February 2012.

APPELLATE EXHIBIT 249  
PAGE REFERENCED: \_\_\_\_\_  
PAGE    OF    PAGES

## WITNESSES/EVIDENCE

5. The Defense does not request any witnesses be produced for this motion.

## LEGAL AUTHORITY AND ARGUMENT

6. The Defense objects to the admission of Enclosure 8 to the Government's motion for Judicial Notice dated 3 August 2012 because it is not relevant under M.R.E. 401 and 402.

7. Pursuant to M.R.E. 401, evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action ore probable or less probable than it would be without the evidence." M.R.E. 402, meanwhile, establishes "evidence which is not relevant is not admissible."

8. Presumably, the Government requests judicial notice of the joint resolution in order to prove some element of Charge I and its Specification, as Article 104 is referenced in sub-paragraph D of the Government's motion. Article 104 requires the Government to prove that PFC Manning gave intelligence to a certain person, did so by indirect means, the person receiving the intelligence was an enemy and the intelligence information was true, at least in part. *See Military Judge's Benchbook, 3-28-4.*

9. Public Law 107-40 states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

10. Public Law 107-40 is not relevant because it does not make any element of Article 104 more or less likely. Article 104 requires proof that the alleged recipient of intelligence was an enemy at the time of the alleged disclosure, yet Public Law 107-40 gives no insight as to whether any particular person was an enemy. While it may be reasonable to presume that one who is subject to a use of force is an enemy<sup>1</sup>, the law offers no insight as to whether the alleged enemy in *this* case is or was subject to a use of force. Rather, it generically states that those responsible for the terrorist attacks of 11 September 2001 are subject to use of force at the President's discretion. There is no evidence on the record that the recipient of the alleged disclosure in this case falls within the group contemplated by Congress when enacting Public Law 107-40. Absent such evidence, Public Law 107-40 does not make it more or less likely that a given person or entity was an enemy at the time of the alleged disclosure of intelligence.

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<sup>1</sup> Indeed, an "enemy" may be defined as "any other hostile body that our forces may be opposing." *Military Judge's Benchbook, 3-28-4(d).*

11. The Government's request for judicial notice of Public Law 107-40 should be denied. The law in question does not make it more or less likely that any particular person or group was an enemy at the time PFC Manning allegedly gave intelligence to a certain person and is, thus, not relevant. *M.R.E. 401*. As such, Public Law 107-40 should be excluded at this time. *M.R.E. 402*.

CONCLUSION

15. Based on the above, the Defense requests that the Court deny the Government's motion for judicial notice of Public Law 107-40.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joshua J. Tooman', written in a cursive style.

JOSHUA J. TOOMAN  
CPT, JA  
Defense Counsel